97TH CONGRESS } HOUSE OF REPRESENTATIVES { REPORT
2d Session } { No. 97-782

REEMPLOYMENT RIGHTS FOR MEMBERS OF THE NATIONAL GUARD AND RESERVE

AUGUST 19, 1982.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

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Mr. MONTGOMERY, from the Committee on Veterans' Affairs, submitted the following

REPORT

[To accompany H.R. 6788]

[Including cost estimate of the Congressional Budget Office]

The Committee on Veterans' Affairs, to whom was referred the bill (H.R. 6788) to amend title 38, United States Code, to clarify the period for which an employer is required to grant an employee who is a member of the National Guard or Reserve a leave of absence in order to allow the employee to perform required active duty for training, having considered the same, report favorably thereon by unanimous voice vote, without amendment, and recommend that the bill do pass.

INTRODUCTION

On May 4 and June 22, 1982, the Subcommittee on Education, Training and Employment held hearings on H.R. 5209, a bill that would clarify the period for which an employer is required to grant an employee, who is a member of a Reserve component of the Armed Forces of the United States, a leave of absence in order to allow such employee to perform required active or inactive duty for training. Witnesses included representatives of the Department of Labor, the Department of Defense, the National Guard Association of the United States and several national veterans' organizations.

On July 15, 1982, the Subcommittee recommended that a clean bill be introduced and reported to the full Committee. On July 19, 1982, H.R. 6788 was introduced. On July 22, with a quorum present and by unanimous voice vote, the full Committee ordered the bill reported to the House.

BACKGROUND

The reemployment rights of members of Reserve components performing periods of active duty for training and inactive duty training

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were established with the enactment of the Universal Military Training and Service Act of 1951. Generally, the Veterans' Reemployment Rights program has worked extremely well since that date.

A person who enlists directly in a Reserve component of the Armed Forces, without having previously performed full active military service, is subject to an initial period of basic military training, usually performed in an active duty status. Although normally scheduled for periods of from 3 to 6 months, it is not uncommon for such periods to last up to 18 months.

In addition to prior active duty or initial active duty for training, members of a Reserve component are subject to other periods of active and inactive duty training. Included in this category are annual 2-week training periods, weekend drills, attendance at service schools for special courses of instruction, disciplinary periods of duty, etc.

Employees who participate in such training duty are protected by provisions in the reemployment statute which establish a separate set of rights and conditions of eligibility differing in certain important respects from the provisions applicable to either full active duty or initial active duty for training. It is the nature of the orders under which the duty is performed, not the actual duration of the duty, that determines which set of reemployment rights and eligibility requirements applies.

The statutory rules pertaining to reemployment rights after training duty are the same for active duty training and for inactive duty training. They are also the same whether the employee's membership in the Guard or the Reserves, or his participation in the particular tour of training duty in question, is voluntary or involuntary.

Historically, the Department of Labor has taken the position that members of Reserve components absent from their civilian employment for the purpose of performing such training were entitled to reinstatement regardless of the length of that training. This protection was found in section 2024(d) of title 38, United States Code. The statute imposes no limit on the number, frequency, or duration of the training duty periods for which the employee has reemployment rights protection. The need for such training is determined by the Armed Forces, which also determine the frequency and duration. As long as the reservist or guardsman had received the necessary orders, he or she had statutory protection.

However, two recent decisions handed down by the Fifth Judicial Circuit, U.S. Court of Appeals appear to have changed the Department's position. In both cases, the Fifth Circuit emphasized that protection under section 2024(d) applies only to members of Reserve components who are called to active or inactive duty for training periods of ninety (90) days or less. See *Peel* v. *Florida, Department of Transportation*, 600 F. 2d 1070 5th Cir. (1979),[1] and *Lee* v. *The City of Pensacola*, 634 F. 2d 866 5th Cir. (1987).[2]

Although the Departments of Labor and Justice successfully litigated the *Peel* case, Guardsman Peel was absent from his job for less than 90 days. The duration of his absence was thus not a crucial factor. However, in the *Lee* case, Guardsman Lee was gone for more than 90 days and the length of time was a crucial factor in the Fifth

[1] See Appendix A of this report.
[2] See Appendix B of this report.

Circuit's ruling that his reemployment rights were not protected under the statute.

Another factor implied in the *Lee* decision is the tendency for some members of Reserve components to take advantage of the fact that section 2024(d) places no limit on the length of time such members can perform duty either for a single training session or cumulatively over an extended period of time.

Prompted by these decisions the Department of Labor has concluded that the legislative history of the statutory language indicates that the Congress was only concerned with short-term recurring periods of military training when it enacted section 2024(d)—periods of military training of not more than 90 days. Accordingly, it is now the Department's view that the protection provided in section 2024(d) does not apply with respect to training periods of more than 90 days.

On May 11, 1981, Mr. George O. Gonzalez, director of the Office of Veterans' Reemployment Rights, Department of Labor, requested an opinion from the Solicitor's Office concerning the protection of a Reservists' reemployment rights contained in section 2024 of title 38. There follows a copy of the communication between the Director of the Office of Veterans' Reemployment Rights and the Office of the Solicitor.

MEMORANDUM

MAY 11, 1981.

To: Beate Bloch, Associate Solicitor Labor-Management Laws.
Attention: Mr. Lamb.

From: George O. Gonzalez, Director, OVRR.

Re: Request for Opinion: Interpretation of Sections 2024(b)(1), 2024(b)(2), 2024(d); 2024(f) in relation to orders for active duty for training, full-time training duty, active Guard or Reserve duty, and active duty support.

This has reference to our request for Solicitor's opinion on the above subject dated October 29, 1980 and our follow-up discussions with Mr. Lamb some time in mid April, 1981.

Pursuant to Mr. Lamb's request that we obtain additional information on the active Guard/Reserve duty and active duty support programs, we recontacted the Department of Defense, Office of the Assistant Secretary and obtained the following information from Colonel Giles Bax (695–4125). According to Colonel Bax authorization for active Guard/Reserve duty is under Title 10 and Title 32. No approval of the employer is needed for personnel to receive orders for AG/R or for the Civilian Conversion Technician program either.

In the hopes of DOL getting a better understanding of how DOD is providing support for the Reserves, Colonel Bax has forwarded a letter dated March 6, 1981 from Deputy Assistant Secretary John Brinkerhoff to the Veterans Administration, and Memorandum dated April 8, 1981 from Mr. Brinkerhoff to the Deputy Assistant Secretaries of the Army, Navy, and Air Force. OVRR review of these two documents leads us to again conclude that AG/R and ADS personnel, although attached to Reserve components, have no relation to the Reserve training covered in Sections 2024 (c) or (d) or (f); and that if these employees are to be protected for reemployment purposes, we must find some means of reaching them; possibly under Section 2021

(as they appear to be similar to regular active duty personnel) or under 2024(b)(2).

Such a conclusion, if it can be legally reached, would clear up a large portion of the questions raised in our October 29, 1980 request.

Our October 29, 1980 opinion request really centers around the following areas:

(1) how to reach AG/R and ADS personnel?

(2) clarification that Reserve personnel on ADT or IADT for longer than 90 days are really outside Section 2024 unless its initial active duty.

(3) whether any rights are provided under 2024(b)(2)?

(4) what procedures, as far as requesting leave, time to apply for reinstatement, etc., are necessary or equitable in relation to ADS and AG/R personnel?

(5) is legislative amendment necessary to cover these employees?

Your advice will be greatly appreciated.

The response to the memorandum of May 11, 1981, from John F. Depenbrock, associate solicitor, dated October 8, 1981, follows:

U.S. DEPARTMENT OF LABOR,
OFFICE OF THE SOLICITOR,
Washington, D.C., October 8, 1981.

MEMORANDUM

To: George O. Gonzalez, Director, Office of Veterans Reemployment Rights.

From: John F. Depenbrock, Associate Solicitor.

Subject: Interpretation of Section 2024 of the Veterans Reemployment Rights Act SOL: 80-2-(VRR).

This is in response to your request for our opinion regarding reemployment rights under section 2024 of the Veterans' Reemployment Rights Act, 38 U.S.C. § 2021, *et seq.* [the Act or the VRR Act] when reservists are ordered to active duty in the following categories: (1) Active Duty for Training [ADT], (2) Active Duty Guard/Reserve [AGR], and (3) Active Duty for Support [ADS]. Based on recent Department of Defense [DOD] policy pronouncements, we believe that the rights and benefits guaranteed to reservists under the VRR Act depends upon whether their designated status is ADT, AGR or ADS.

In a memorandum dated April 8, 1981 and an explanatory letter of March 6, 1981, DOD discussed the status of National Guard and reserve personnel ordered to active duty on ADT, AGR and ADS status. DOD directed that reserve personnel ordered to active duty for less than 179 days to participate in study groups, accomplish short-term work projects or support functions, would be in ADS status; those ordered to active duty for more than 180 days for study and work projects would be in AGR status. DOD explicitly stated that personnel on ADS or AGR status are not receiving training per se,

and cannot be considered to be in an ADT status. Rather, DOD stated that AGR and ADS duty fall within the definition of "active duty" contained in 38 U.S.C. § 101(21)(A).

The order to active duty is significant in terms of the VRR Act as the particular status determines the applicable reemployment rights. Specifically, reserve and National Guard personnel on AGR and ADS status fall under the protections of section 2024(b)(2) of the Act, and are entitled to the same reemployment benefits provided in sections 2021 and 2022 which covers individuals inducted into the service.[1] The normal procedures for requesting leave and applying for reinstatement that apply to any reservist reporting to regular active duty would also apply to reservists reporting to duty to study or participate in work projects in either ADS or AGR status.

Reserve personnel who are ordered to ADT or Inactive Active Duty Training [IADT] status are entitled to reemployment benefits under section 2024(d) of the Act. The legislative history of Section 2024(d) indicates that it was intended to apply to reservists or members of the National Guard ordered to ADT for periods of less than three months. The legislative history of that section clearly states that Congress intended ADT status to be limited to short term military service of less than 90 days in the following statement on behalf of the Committee on Armed Services:

"The new subsection 4 [codified as section 2024(d)] would include job provisions regarding job protections and employment rights that apply to all military trainees not previously covered. Therefore, those individuals on active duty training under orders which contemplates service of less than 3 months and all other training duty, active or inactive, for lesser periods of time are covered by this section."

H.R. Rep. No. 1263, 86th Cong., 2d Sess. 7 (1960).

In addition, Senate Report No. 1070 discussed the nature of the absences of reserve or National Guard members from employment who were to be given reemployment protections, for short term absences. Specifically, the report described the absences of reservists and members of the National Guard contemplated to be covered by the Act to be repetitive. It stated that reemployment protections were intended to be given to "reservists and members of the National Guard who leave their jobs repeatedly for short tours of training". S.Rep. No. 1070, 87th Cong., 1st Sess. 2, reprinted in [1961] U.S. Code Cong. & Adm. News 3319, 3320. Thus, ADT and IADT personnel are not entitled to VRR Act benefits if their orders are for duty longer than 90 days.

In the April 1981 memorandum, DOD indicated that in the past many National Guard and Reserve personnel were ordered to ADT status when they actually were performing short term work projects and administrative or support functions and thus should have been on ADS or AGR status. DOD's memorandum clearly defines the appropriateness of each status and has directed that the individuals ordered to duty reflect these definitions. This clarification by DOD appears to have resolved the confusion resulting from the past practice of

[1] Sections 2021(a) and (b)(1) outline the reemployment rights of persons who are inducted into the Armed Forces under the Military Selective Act. The National Guard members' and reservists' rights are found in section 2024, as they have not been inducted pursuant to the Military Selective Service Act.

ordering personnel to ADT for periods of longer than 90 days when they were engaged in support work and not receiving "training" per se. According to DOD directives, reserve personnel ordered to active duty will no longer automatically be ordered to ADT status. The orders will be based on the function to be performed and the duration. National Guard and Reserve personnel ordered to active duty in support of the Reserve Components for study groups will be placed on ADS if the requirement is 179 days or less. The Service Secretary may grant a one time extension not to exceed 179 days. Personnel assigned to projects requiring more than 179 days will be designated AGR. However, individuals ordered to ADT status for more than 90 days would not be entitled to benefits under the VRR Act and for them to receive coverage under the VRR Act, it appears that legislation to amend the Act would be necessary.

There follows a memorandum dated November 18, 1981, from the Office of the Veterans' Reemployment Rights, explaining the interpretation of the duration of training under section 2024(d), title 38, United States Code.

U.S. DEPARTMENT OF LABOR,
LABOR-MANAGEMENT SERVICES ADMINISTRATION,
OFFICE OF VETERANS' REEMPLOYMENT RIGHTS,
Washington, D.C., November 18, 1981.

MEMORANDUM

To: All Regional Administrators; all Assistant Regional Administrator/VRR; all Area Administrators; all LM/VR Track Supervisors; all LM/VR Track Investigators; and all Resident Investigators.

From: CRC (for) Director, OVRR.

Subject: Interpretation of Section 2024 of the Veterans' Reemployment Rights Statute; Foundation of Rights of Reservists on Active Duty under 2024(b)(1); Duration of Training under 2024(d).

OVRR has for some time been faced with a series of inter-related questions concerning potential reemployment rights for members of Reserve components and the identification of those rights as predicated by specific Reserve training or active duty orders. On May 21, 1981, OVRR distributed Associate Solicitor Bloch's opinion on the application of 2024 and the civilian conversion technician program. The Solicitor found that the Reservists being ordered to things like "full time training duty for two years" had no coverage under 2024 (d). Groups of inquiries from Area Offices about Reservists with novel orders issued by DOD have generated another series of requests for Solicitor's opinions on the interpretation of Section 2024. At the center of this controversy are the new types of orders that are currently being issued to members of Reserve components; "full-time training duty," "active Guard/Reserve duty," "active duty support," and "active duty for training." A crucial question appears to be the

duration of training permissible and protected under Section 2024(d).

Our concerns over 2024 interpretation were voiced in the form of a request for a Solicitor's opinion, dated October 29, 1980, a copy of which is attached hereto. You will note that in that request we referred to the Fifth Circuit's ruling in *Peel* v. *The Florida Department of Transportation* (No. 728, A&B) wherein the court indicated that training under 2024(d) was confined to 90 days duration. Since the *Peel* court ruled, a similar finding has been reached, again by the Fifth Circuit, in *Lee* v. *City of Pensacola* (No. 789, A), a private suit. While the *Peel* decision was favorable to Guardsman Peel, the Fifth Circuit ruled against Guardsman Lee, noting among other things that the Guardsman had been on active duty for training for longer than 90 days, and therefore was not entitled to the protection of 2024(d).

A supplemental request for Solicitor's opinion on 2024 rights was forwarded May 11, 1981. It was accompanied by the Department of Defense policy on selection, utilization, and reporting of personnel providing full-time support for the Reserve components, a copy of which dated April 8, 1981 is attached hereto, as well as a chart on Ready Reserve strength which identifies various elements of the Reserve forces. You will note from the chart that drilling Reservists are Reservists who receive orders for "active duty for training," "inactive duty for training," or "active duty support of 179 days or less." "Active duty" for Guard and Reserve personnel means orders for active duty support of 180 days or longer or orders for "active Guard/Reserve duty." Such personnel are considered full-time unit support, similar to the military technicians who are civilian employees in that they are doing mission support work and not training.

We have now had an opportunity to discuss the ramifications of these new orders with the Associate Solicitor for Labor-Management Laws and are in receipt of the Solicitor's opinion dated October 8, 1981, copy attached. From this Solicitor's opinion we are able to draw three major conclusions, which we believe require and deserve amplification.

One: It now appears to us that Reserve personnel who enter onto active duty support or active Guard/Reserve status have reemployment rights under Section 2024(b)(1) and (2) of the statute, and are entitled to all benefits and must abide by all obligations of employees with rights under Section 2021. The differentiation arises, of course, in that members of Reserve components have not been inducted and therefore do not have coverage under the Military Selective Service Act, per se, but are entitled to such coverage by way of 2024's reference to 2021.

What this protection means in terms of the claimant's obligations in order to meet eligibility criteria is at this writing not totally clear to us. It would appear that claimants whose rights under 2024 are referenced to 2021, also have obligations as referenced in 2021. This could mean that they are obligated to comply with the provisions of 2021 as far as possessing a certificate of satisfactory service, and must apply for reinstatement within 90 days of separation from active duty. It also appears that the periods of active duty in active Guard/Reserve or active duty support status will be counted toward the maximum

four years spent on active duty and Reservists should be so counselled whenever we have the opportunity. The Solicitor advises us that although we recognize Section 2021 does not have a request for military leave of absence provision, it would be well to continue to caution members of Reserve components to *request* military leaves of absence even though they are departing for mission support and work related active duty and not for active duty for training. Also, OVRR feels it would be well to advise these employees to report back to work for reinstatement purposes as soon as possible after active duty rather than testing whether the ninety-day provision will actually be upheld. To wait out the ninety-day grace period could result in an employee resting for longer than the period spent on active duty, clearly not an equitable labor-relations situation.

We believe these claimants should be entitled to the one year's protection from discharge, and treated in spite of the above cautions like "veterans" even though they are in the Reserves. For FARS purposes, code them as 30 or 35.

As indicated above, there are some gray areas ahead of us in processing these cases. In certain instances we may be compelled to look behind the face of the orders issued to determine the real nature of the assignment on which some Reservists were placed. This is especially true in those instances of Reserve personnel currently on duty on what the Reserve Affairs section of the Pentagon has described as "illegal orders." Each case may have to be dealt with on its own merits, and until we receive some court interpretation of the 2024/2021 type case, we can only advise to make your determinations in light of equity and fair employment practices.

It appears to us, however, that it may be inevitable that some members of Reserve components out on military duty now may end up with no reemployment rights due to a combination of illegal orders, lack of compliance with statutory eligibility requirements, and running over the five years active duty maximum.

Two: With reference to Section 2024(d), it appears that although the statute is silent concerning a maximum amount of time that can be spent on active duty or inactive duty for training, that coverage under Section 2024(d) is limited to 90 days or less based upon SOL's current view of the legislative history. Therefore, we will have to revise our operating policy to be in conformance with what the Fifth Circuit has already found in *Peel* and *Lee*, and to caution members of Reserve components that they may not be entitled to reemployment rights if their orders are for active duty for training or inactive duty for training for longer than 90 days. Correspondence is being initiated with the Department of Defense to alert DOD of the implication of these rulings, and hopefully to lessen the impact on members of Reserve components.

Three: The Solicitor concludes that for members of Reserve components who are ordered to active duty for training or inactive duty for training for more than 90 days to have reemployment coverage it would be necessary to seek legislative amendment. At this writing OVRR has no impressions or information concerning the possibility of such a proposal.

This new interpretation of section 2024(d) and its potential effect on members of Reserve components who attend training for longer than 90 days is of great concern to the Committee. The Committee disagrees with the new interpretation of section 2024(d) by the Solicitor of the Department of Labor, and the confusion that currently exists prompts the Committee to clarify congressional intent on the reemployments rights of veterans. The reported bill would carry out this purpose.

Summary of the Bill

The Department of Labor is of the opinion that the job of a member of a Reserve component of the Armed Forces who is absent from civilian employment to perform active or inactive duty for training for more than 90 days is not protected under the Veteran's Reemployment Rights program administered by the Department of Labor.

According to the Department of Defense, there are approximately 6,000 members of the Reserves and National Guard nationwide who are annually required to take training in excess of 90 days. For this small group, there is now no assurance that their jobs will be available to them when they return to their civilian employment.

The reported bill, H.R. 6788, would clarify existing law and would provide that a member of a Reserve component who is absent from civilian employment to perform active or inactive duty for training will have reemployment protection so long as the period of training is not more than 12 months within any 3 calendar years. The purpose of the bill is to place a specific limit on the amount of time an individual can be away from the job and continue to have reemployment rights. This will ensure that individuals who are essential to our national defense have sufficient time to train, while at the same time give some modicum of protection to their civilian employers who must accommodate them by granting leave.

The proposed amendment to section 2024(d) would limit the cumulative total days a member of a Reserve component could be on military leave of absence while having his or her reemployment rights protected. There is no specific limitation on the time individuals may be away during any one training period; however, there would be an overall 1-year limitation within any 36-month period.

Since all Reserve component members must attend weekend drills and annual 2-week training periods, those periods of training would not count toward the cumulative total. The proposed amendment in no way changes the requirement that an employer must grant an individual a leave of absence upon being put on notice (the "request" requirement of section 2024(d)) prior to the individual's departure for training. Nor would the amendment change the law that leaves of absence must be granted for all training duty for which the Reserve component member has orders, regardless of the nature of the duty or whether the employer views the training as "required" or "essential".

It should be noted that the Committee does not intend for the proposed amendment to change in any way the reemployment protection provided to an employee who engages in active duty for training in excess of 12 calendar months with the employer's approval.

Oversight Findings

An oversight hearing on employment and reemployment rights' programs administered by the Department of Labor was held on May 4, 1982, by the Committee's Subcommittee on Education, Training and Employment. Testimony was received from representatives of the Department of Labor, the Department of Defense, the National Guard Association of the United States and various national veterans organizations.

No oversight findings have been submitted to the Committee by the Committee on Government Operations.

Budget Statement

U.S. Congress,
Congressional Budget Office,
Washington, D.C., July 26, 1982.

Hon. G. V. Montgomery,
Chairman, Committee on Veterans' Affairs, U.S. House of Representatives, Washington, D.C.

Dear Mr. Chairman: Pursuant to Section 403 of the Congressional Budget Act of 1974, the Congressional Budget Office has reviewed H.R. 6788, a bill to clarify the period for which an employer is required to grant an employee who is a member of the National Guard or Reserve a leave of absence in order to allow the employee to perform required active duty for training. This bill was ordered reported by the House Committee on Veterans' Affairs on July 22, 1982. Based on our review, it is expected that the additional cost to the government as a result of enactment of this legislation would not be significant.

Sincerely,

Alice M. Rivlin, *Director.*

Cost of the Reported Bill

The Committee concurs in the statement of the Congressional Budget Office that the reported bill would not impose any additional cost to the Government were it to be enacted.

Inflationary Impact

The reported bill would have no inflationary impact.

Agency Reports

On December 21, 1981, the Committee requested an official report on H.R. 5209 from the administration. Despite repeated efforts to obtain the report, no report was received at the time of the hearing on May 4, 1982. On June 22, 1982, the Subcommittee on Education, Training and Employment held another hearing concerning the same subject matter, along with other education and training proposals. Again, the administration failed to submit an official position on the issue.

Notwithstanding the Administration's failure to submit an official position on the proposed legislation, the positions of the Department of Defense and the Department of Labor were presented to the Subcommittee by representatives of the two departments. Views of the Department of Defense were presented by Mr. Dennis R. Shaw, Principal Director to the Deputy Assistant Secretary of Defense for Reserve Affairs. Testifying in support of the proposed legislation, Mr. Shaw said:

> For this reason, I believe legislation such as H.R. 5209 and H.R. 6440 is timely and needed. However, I would like to apprise this Committee that the language in both bills, proposing to amend the first sentence of section 2024(d) of title 38 by inserting the words "for any period not in excess of 12 months" after "active duty for training", may be too broad. I am concerned that this language could be construed as permitting back-to-back 1 year absences from civilian employment. Such an interpretation might have the effect of signaling employers, upon whose cooperation and support we heavily rely, that it might be disadvantageous to employ members of our National Guard and Reserve. And, in light of the very real need to strike an equitable balance between the increasing training needs of the Guard and Reserve Forces and the interests of civilian employers, the Department of Defense has prepared substitute language as follows:
>
> (1) by amending section 2024(d) by inserting after the first sentence—
>
> "Subject to the provisions of this section, an employer is required to provide a leave of absence for the period stated in the military or naval orders that are provided such employer before the commencement of the leave of absence and for such additional period as may be required to complete the training specified in such orders. The duration of active duty for training covered under this section shall not exceed 12 months within any 3 calendar years if initiated voluntarily by an individual Guard or Reserve member and determined to be necessary by the Secretary of the Military Department concerned. However, nothing within this section shall be construed to preclude voluntary participation in active duty for training in excess of 12 months if such participation has been approved by an employer.
>
> "We believe this substitute language will allow employers to know better what are the limits of the period of time involved for additional active duty for training while at the same time permitting the needed degree of flexibility for the many types of training that require the protection afforded by chapter 43 of title 38. The substitute language also would permit an extension of the stated period in order to permit completion of a training program that may extend beyond what initially was estimated. By defining reemployment protection to encompass 12 months within any 3 calendar years, the substitute language would provide a greater degree of

protection to the employer and thereby reduce the likelihood that Guard or Reserve membership might be prejudicial to an employee."

The Assistant Secretary of Labor for Veterans' Employment, Hon. William C. Plowden, Jr., presented the position of the Department of Labor. Mr. Plowden stated:

> Section 14 of H.R. 6440 would require employers to grant a leave of absence to Reservists required to perform active duty for training "for any period not in excess of 12 months." Mr. Chairman, we believe that the provision lacks clarity as to time limitation for the training period. We would suggest that in lieu of this provision, language be added to limit the duration of active duty for training covered under the law, to a period not to exceed 12 months within any 3 calendar years when determined to be necessary by the Secretary of the military department concerned. We believe that changing the law in this manner provides adequate time for such training.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3 of Rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (new matter is printed in italic, existing law in which no change is proposed is shown in roman):

SECTION 2024 OF TITLE 38, UNITED STATES CODE

§ 2024. Rights of persons who enlist or are called to active duty; Reserves

(a) * * *

* * * * * * *

(d) Any employee not covered by subsection (c) of this section who holds a position described in clause (A) or (B) of section 2021(a) shall upon request be granted a leave of absence by such person's employer for the period required to perform active duty for training or inactive duty training in the Armed Forces of the United States. *However, an employer is not required to grant such a leave of absence for a total of more than 365 days (excluding required weekend drills and required annual two-week training periods) within any 36-month period.* Upon such employee's release from a period of such active duty for training or inactive duty training, or upon such employee's discharge from hospitalization incident to that training, such employee shall be permitted to return to such employee's position with such seniority, status, pay, and vacation as such employee would have had if such employee had not been absent for such purposes. Such employee shall report for work at the beginning of the next regularly scheduled working period after expiration of the last calendar day necessary to travel from the place of training to the place of employment following such employee's release, or within a reasonable time thereafter if delayed return is due to factors beyond the employee's control. Failure to report for work at such next regularly scheduled working period shall make the employee subject to the conduct rules of the employer pertaining to explanations and discipline with respect to absence from scheduled work. If such an employee is hospitalized incident to active duty for training or inactive duty training, such employee shall be required to report for work at the beginning of the next regularly scheduled work period after expiration of the time necessary to travel from the place of discharge from hospitalization to the place of employment, or within a reasonable time thereafter if delayed return is due to factors beyond the employee's control, or within one year after such employee's release from active duty for training or inactive duty training, whichever is earlier. If an employee covered by this subsection is not qualified to perform the duties of such employee's position by reason of disability sustained during

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active duty for training or inactive duty training, but is qualified to perform the duties of any other position in the employ of the employer or such employer's successor in interest, such employee shall be offered employment and, if such person so request, be employed by that employer or such employer's successor in interest in such other position the duties of which such employee is qualified to perform as will provide such employee like seniority, status, and pay, or the nearest approximation thereof consistent with the circumstances in such employee's case.

* * * * * * *

APPENDIX A

indicating that he participated in the unlawful seizure and incarceration. Moreover, the district court made no finding that he was so involved. The judgment as to deputy Carr therefore must be set aside.

[2, 3] The district court likewise made no findings as to the basis of the Sheriff's liability. Under Louisiana law, "(t)he relationship between the sheriff and his deputies is neither master-servant, nor principal-agent, and the sheriff's liability is not based on the doctrine of *respondeat superior* . . but it is, nevertheless, a form of limited vicarious liability." *Baskin v. Parker*, 588 F.2d 965, 968 (5th Cir. 1979). "[A] sheriff (is) personally liable for those acts of his deputies that he directs and that occur in his presence." *Id.* This liability encompasses both compensatory as well as punitive damages. If the basis of liability is vicarious only, however, the Sheriff cannot be held for punitive damages under Louisiana law or 42 U.S.C. § 1983 (1976). *Id.* at 969. A limited remand is in order so that specific findings of fact and conclusions of law can be made as to the basis of the Sheriff's liability.

In sum, the judgment of the district court is AFFIRMED as to the appellants Dykes and Binder and REVERSED as to appellant Carr. While retaining jurisdiction over the cause, we remand the case to the district court for the limited purpose of dismissing the case against appellant Carr and entering findings of fact and conclusions of law as to appellant Edwards. We direct that the district court make its findings and conclusions within 60 days and certify the record thereof to us.

IT IS SO ORDERED.

Frederick D. PEEL, Plaintiff-Appellee,

v.

FLORIDA DEPARTMENT OF TRANSPORTATION, Tom B. Webb, Jr., as Secretary, Defendants-Appellants.

No. 77-1846.

United States Court of Appeals, Fifth Circuit.

Aug. 13, 1979.

Permanent full-time employee of the State of Florida who was discharged because he was absent from work to attend National Guard training brought suit to secure reemployment and to recover lost wages and benefits. The United States District Court for the Northern District of Florida, William H. Stafford, J., 443 F.Supp. 451, entered summary judgment for the employee and the Florida Department of Transportation appealed. The Court of Appeals, Tjoflat, Circuit Judge, held that: (1) since the provision of the Veterans' Reemployment Rights Act which authorizes suit against a state was within the legitimate scope of Congress' war power, the employee's suit to enforce rights granted by the Act was not barred by the Eleventh Amendment; (2) an award of lost wages and benefits and the reinstatement of the employee were appropriate forms of relief; and (3) the Tenth Amendment did not bar enforcement of remedies provided by the Act.

Affirmed.

1. States ⇐4.12

Although states are free to establish additional rights and protections supplemental to those provided by the Veterans' Reemployment Rights Act, states are not free to restrict the reemployment rights created by the Act. 38 U.S.C.A. §§ 2021–2026, 2022.

2. Federal Courts ⇐265

The Eleventh Amendment limits the power of the federal judiciary to enforce

private rights against a state. U.S.C.A. Const. Amend. 11.

3. Federal Courts ⇐267

Where a state consents to being sued, neither the Eleventh Amendment nor the doctrine of sovereign immunity is a bar. U.S.C.A.Const. Amend. 11.

4. Federal Courts ⇐265

Inclusion by Congress in the Veterans' Reemployment Rights Act of a section expressly authorizing suit against a state to obtain compliance with the Act and to provide compensation for lost wages and benefits established that Congress considered and firmly decided to abrogate the Eleventh Amendment immunity of the states in connection with private actions to enforce rights under the Act. U.S.C.A.Const. Amends. 10, 11; 38 U.S.C.A. §§ 2021–2026, 2022.

5. Federal Courts ⇐265

Nothing in the history of the Eleventh Amendment, the doctrine of sovereign immunity or the case law indicates that Congress, when acting under the war power, lacks the authority to provide for federal judicial enforcement of private actions for damages against the states. U.S.C.A.Const. art. 1, § 8, cls. 1, 11–14, 16, 18; Amend. 11.

6. Federal Courts ⇐267

Under the Eleventh Amendment, a state's voluntary consent to be sued may be essential where Congress has not indicated a sufficient intent to abrogate a state's immunity but has enacted legislation literally applicable to the state; in such a case, the state could voluntarily consent to suit by a private litigant. U.S.C.A.Const. Amend. 11.

7. Federal Courts ⇐265

Since the responsibility for defense of the union was delegated to Congress, Congress should be able, under its war power, to remove a state's Eleventh Amendment immunity from suit. U.S.C.A.Const. art. 1, § 8, cls. 1, 11–14, 16, 18; Amends. 10, 11.

8. Federal Courts ⇐265

It was within Congress' war power to enact the section of the Veterans' Reemployment Rights Act which expressly authorizes suit against a state to achieve compliance with the Act and, therefore, there was no Eleventh Amendment bar to maintenance of such suit to enforce rights under the Act. U.S.C.A.Const. Amend. 11; 38 U.S.C.A. §§ 2021–2026, 2022.

9. Federal Courts ⇐265

Since, by enacting the Veterans' Reemployment Rights Act, Congress expressly lifted the State of Florida's Eleventh Amendment immunity, federal court could order the Florida Department of Transportation to reinstate a former employee who had been discharged in violation of the Act and the court could also require that the former employee be compensated for lost wages and benefits. U.S.C.A.Const. Amend. 11; 38 U.S.C.A. §§ 2021–2026, 2022.

10. States ⇐4.17

In determining whether congressional action violates the Tenth Amendment, court must assess and weigh the source of the congressional power and the legitimacy of its exercise against the degree of interference with integral governmental functions of the state and political subdivisions; where the legitimate exercise of a power delegated to Congress outweighs the interference with the states' self-determination in providing essential public services, the Tenth Amendment is no bar to congressional action. U.S.C.A.Const. Amend. 10.

11. States ⇐4.6

Overseeing the transportation system of the state has traditionally been one of the functions of state government and thus appears to be within the activity protected by the Tenth Amendment. U.S.C.A.Const. Amend. 10.

12. States ⇐4.17

Providing reemployment rights for those who have been called to the service of their country is a legitimate exercise of Congress' power to raise armies. U.S.C.A. Const. art. 1, § 8, cls. 1, 11–14, 16, 18; 38 U.S.C.A. §§ 2021–2026.

13. States ⇐4.16

Where Congress acts in a direct manner under its war power and does not unduly encroach on the states' integral governmental functions, the Tenth Amendment does not limit Congress' power. U.S.C.A. Const. art. 1, § 8, cls. 1, 11–14, 16, 18; Amend. 10.

14. States ⇐4.16

Where collective action becomes necessary to deal with serious national problems, the protected area of state sovereignty must give way to congressional mandate. U.S.C.A.Const. Amend. 10.

15. Commerce ⇐3

Even nonemergency exercises of the commerce power outweigh state interests in certain circumstances. U.S.C.A.Const. art. 6, cl. 2; Amends. 10, 11.

16. States ⇐4.16

The Tenth Amendment did not bar enforcement against the states of remedies provided by the Veterans' Reemployment Rights Act. U.S.C.A.Const. Amend. 10; 38 U.S.C.A. §§ 2021–2026, 2022.

George L. Waas, Gen. Counsel, State of Florida, H. Reynolds Sampson, John J. Rimes, III, Dept. of Transp., Tallahassee, Fla., for defendants-appellants.

Donald S. Modesitt, Asst. U. S. Atty., N. D. Fla., Tallahassee, Fla., William H. Berger, U. S. Dept. of Labor, Atlanta, Ga., Leonard Schaitman, Atty., Appellate Section Civil, Div. Dept. of Justice, Washington, D. C., Bobbye D. Spears, Regional Sol., Dept. of Labor, Atlanta, Ga., for plaintiff-appellee.

Appeal from the United States District Court for the Northern District of Florida.

Before TJOFLAT and HILL, Circuit Judges, and HIGGINBOTHAM,* District Judge.

TJOFLAT, Circuit Judge:

This case requires us to decide whether the tenth amendment[1] or the eleventh amendment[2] prevents a federal court from ordering a state agency to reinstate a former employee under the Veterans' Reemployment Rights Act (the Act), 38 U.S.C. §§ 2021–2026 (1976),[3] passed pursuant to the war power of Congress.[4] The district

* District Judge of the Northern District of Texas, sitting by designation.

1. U.S.Const. amend. X provides:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

2. U.S.Const. amend. XI provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

3. Section 2022 of the Act authorizes a person covered by the Act to bring an action in federal court to enforce the reinstatement rights granted by the Act.

> If any employer, who is a private employer or a State or political subdivision thereof, fails or refuses to comply with the provisions of section 2021(a), (b)(1), or (b)(3), or section 2024, the district court of the United States for any district in which such private employer maintains a place of business, or in which such State or political subdivision thereof exercises authority or carries out its functions, shall have the power, upon the filing of a motion, petition, or other appropriate pleading by the person entitled to the benefits of such provisions, specifically to require such employer to comply with such provisions and to compensate such person for any loss of wages or benefits suffered by reason of such employer's unlawful action. . . .

4. U.S.Const. art. I, § 8 provides, *inter alia*:

> The Congress shall have Power To . . . provide for the common Defence and general Welfare of the United States; . . .
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> . . . . .
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> To declare War, . . .
> To raise and support Armies, . . .
> To provide and maintain a Navy;
> To make Rules for the Government and Regulation of the land and naval Forces; . . .
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> . . . . .
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> To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, . . .
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> . . . . .
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> To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers . . . .

court granted plaintiff Frederick D. Peel's motion for summary judgment, ruling that the defendants, the Florida Department of Transportation (DOT) and its Secretary, had violated the Act by terminating Peel's employment; the court ordered that Peel be reinstated and compensated for lost wages and benefits. *Peel v. Florida Department of Transportation*, 443 F.Supp. 451 (N.D.Fla.1977). The DOT and the Secretary contend that Peel's suit is barred by the tenth and eleventh amendments. We reject their contentions and affirm.

I

Peel was a permanent full-time employee of the DOT for more than three and one-half years. The DOT was and continues to be an agency of the state of Florida. Prior to September 5, 1975, Peel had used for reserve military duty fourteen of the seventeen days allotted annually for military leave under Florida law.[5] On that date, Peel requested military leave after receiving orders for full time training duty with the national guard for the period September 9, 1975, to November 6, 1975. The request was denied, but Peel nevertheless reported as ordered for training duty.

By letter dated September 16, 1975, the DOT advised Peel that he had been discharged, since he was deemed to have abandoned his position under Florida Department of Administration Rule 22A–7.10(B) by virtue of his absence for three consecutive workdays without authorized leave. On November 7, 1975, after completing his training with the national guard, Peel applied for reemployment. The DOT refused and has continued to refuse reemployment.

Peel instituted this action on October 8, 1976, to secure reemployment and to receive lost wages and benefits. The defendants moved to dismiss the complaint on various grounds, including that the action was barred by the tenth and eleventh amendments. The motion was considered in conjunction with the parties' reciprocal motions for summary judgment made on a joint stipulation of facts and was denied when the district court entered summary judgment for Peel. This appeal followed, and a stay of the judgment was granted. Only the tenth and eleventh amendment issues are before this court.

II

[1] In 1974, Congress extended veterans' reemployment rights to employees of state and local governments and authorized enforcement actions against the states and their political subdivisions. Act of Dec. 3, 1974, Pub.L. No. 93–508, 88 Stat. 1594 (codified at 38 U.S.C. §§ 2021–26 (1976)). By doing this, Congress provided state and local government employees with reemployment rights that previously had been given to other veterans who had left their civilian jobs to serve in the armed forces, including the national guard.[6] Although states are free to establish additional rights and protections supplemental to those the Act pro-

5. Fla.Stat. § 115.07 (1977) provides:

> All officers or employees of this state, or of the several counties or municipalities of this state, who are commissioned reserve officers or reserve enlisted personnel in the United States military or naval service or members of the National Guard, shall be entitled to leave of absence from their respective duties, without loss of pay, time or efficiency rating, on all days during which they shall be engaged in field or coast defense exercise or other training ordered under the provisions of the United States military or naval training regulations for such personnel when assigned to active duty; provided that leaves of absence granted as a matter of legal right under the provisions of this section shall not exceed 17 days in any one annual period; provided, further, that leaves of absence for additional or longer periods of time without pay for assignment to duty with civilian conservation corps units or other functions of military character may be granted in the discretion of employing or appointing authority of any state, county or municipal employee and when so granted shall have the force and effect of other leaves of absence authorized by this section.

6. Reemployment rights have been granted to veterans since the Selective Training and Service Act of 1940, c. 720, § 8, 54 Stat. 890 (1940) (expired 1947). Full reemployment rights for reservists and national guardsmen who perform short-term training duty are presently provided by 38 U.S.C. §§ 2021(b)(3) and 2024(d) (1976).

vides, 38 U.S.C. § 2021(a) (1976), they are not free to restrict the reemployment rights that the Act has created.

The district court found that the constitutional basis for the Act flowed from Congress's war power. In addition, the court ruled that the Act applied to Peel and that the termination of his employment and the denial of reemployment were in violation of the Act. 443 F.Supp. at 454–55. Relying upon the supremacy clause, U.S.Const. art. VI, cl. 2,[7] the court determined that the provisions of the Act preempted the Florida statute that limited Peel's right to military leave to seventeen days annually.

III

The two issues presented in this appeal are whether an otherwise valid congressional exercise of the war power is rendered unenforceable by either the tenth or the eleventh amendment. We will treat them in reverse order.

A. *The Eleventh Amendment*

[2] We first address the eleventh amendment issue, since it concerns the threshold question of whether a federal court may entertain this suit. Although Congress has the power under its war power and the necessary and proper clause, see note 4 *supra*, to provide for the nation's defense, the eleventh amendment limits the power of the federal judiciary to enforce private actions against the states. While the language of the amendment limits the judicial power with regard to suits against a state by citizens of another state or by citizens or subjects of any foreign state, its limitation has been interpreted to extend to suits against a state by its own citizens. *Hans v. Louisiana*, 134 U.S. 1, 10 S.Ct. 504, 33 L.Ed. 842 (1890).[8] Peel is a Florida citizen and his suit is a suit against the state, since the Florida DOT is a component of the state government. *State v. Love*, 99 Fla. 333, 126 So. 374 (1930). In addition, where, as here, the liability for back wages and benefits under the Act must be paid from public funds in the state treasury, the eleventh amendment may also serve as a bar. *Edelman v. Jordan*, 415 U.S. 651, 663, 94 S.Ct. 1347, 1356, 39 L.Ed.2d 662 (1974); *Jagnandan v. Giles*, 538 F.2d 1166, 1176 (5th Cir. 1976), *cert. denied*, 432 U.S. 910, 97 S.Ct. 2959, 53 L.Ed.2d 1083 (1977).

Appellants urge us to reverse the district court and find that the state of Florida is immune from suit and has not waived its immunity. Although the relationship between congressional authorization of suits against a state and the necessity of a state's consent to suit has created confusion concerning the contours of the immunity that a state enjoys,[9] the development of the law involving the eleventh amendment leads us to conclude that this action could properly be brought in federal court. We endeavor

7. This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

8. Although there is debate as to whether this extension of a state's immunity to suits by its own citizens is incorporated into the eleventh amendment or is based solely on the doctrine of sovereign immunity, *compare Employees of Dept. of Pub. Health & Welfare v. Department of Pub. Health & Welfare*, 411 U.S. 279, 280 n. 1, 93 S.Ct. 1614, 1616, 36 L.Ed.2d 251 (1973) *with id.* at 309–15, 93 S.Ct. at 1630–33 (Brennan, J., dissenting), we need not address the issue since under our interpretation of the law in this area, neither theory would prevent Congress from explicitly authorizing a suit against the state.

9. Various commentators have discussed the interrelationship between the power and intent of Congress to subject states to private suits in federal court and the requirement of state consent to be sued. *See* Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Congressional Imposition of Suit Upon the States*, 126 U.Pa.L.Rev. 1203 (1978); Nowak, *The Scope of Congressional Power to Create Causes of Action Against State Governments and the History of the Eleventh and Fourteenth Amendments*, 75 Colum.L.Rev. 1413 (1975); Tribe, *Intergovernmental Immunities in Litigation, Taxation, and Regulation: Separation of Powers Issues in Controversies About Federalism*, 89 Harv.L.Rev. 682 (1976).

to examine the cases in this area to trace this development.

[3] Where a state consents to being sued, neither the eleventh amendment nor the doctrine of sovereign immunity is a bar. *See Petty v. Tennessee-Missouri Bridge Commission*, 359 U.S. 275, 79 S.Ct. 785, 3 L.Ed.2d 804 (1959); *Clark v. Barnard*, 108 U.S. 436, 2 S.Ct. 878, 27 L.Ed. 780 (1883). In the absence of an express consent by a state to be sued, federal courts have still attempted to find some type of implied or constructive consent by the state to avoid the limitations of the eleventh amendment. Thus, in *Parden v. Terminal Railway*, 377 U.S. 184, 84 S.Ct. 1207, 12 L.Ed.2d 233 (1964), the Court found that the state of Alabama, by its conduct in operating a railroad, had consented to suit in federal court under the Federal Employers' Liability Act (FELA), 45 U.S.C. §§ 51–60 (1976). In *Parden*, employees brought an FELA personal injury suit for damages against an Alabama-owned interstate railroad. The Court first examined whether Congress had intended to include state-owned as well as privately-owned rail carriers under the coverage of the FELA. Although there was no language in the FELA specifically authorizing suits against a state, Congress had made the FELA applicable to "every" interstate rail carrier, thus including the Alabama-owned railroad within its coverage.

After finding that the state-owned railroad was within the coverage of the FELA, the Court next examined whether Congress had the power to subject Alabama to suit in light of the state's sovereign immunity. Justice Brennan, writing for a five-member majority, found that by empowering Congress to regulate commerce, "the States necessarily surrendered any portion of their sovereignty that would stand in the way of such regulation." 377 U.S. at 192, 84 S.Ct. at 1212. However, the majority opinion then went on to explain that the eleventh amendment was not being overridden, since a state still could not be sued by an individual without its consent. The Court concluded that Alabama had consented to a suit under the FELA by its continued operation of an interstate railroad for approximately twenty years after Congress had made such railroads subject to suit under the FELA.

Four Justices disagreed with the quality of statutory notice that was necessary before Congress could make the states subject to suit through their implied consent.

> It should not be easily inferred that Congress, in legislating pursuant to one article of the Constitution, intended to effect an automatic and compulsory waiver of rights arising out of another. Only when Congress has clearly considered the problem and expressly declared that any state which undertakes given regulable conduct will be deemed thereby to have waived its immunity should courts disallow the invocation of this defense.
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> . . . If the automatic consequence of state operation of a railroad in interstate commerce is to be waiver of sovereign immunity, Congress' failure to bring home to the State the precise nature of its option makes impossible the "intentional relinquishment or abandonment of a known right or privilege" which must be shown before constitutional rights may be taken to have been waived. *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461; *Fay v. Noia*, 372 U.S. 391, 83 S.Ct. 822, 9 L.Ed.2d 837.

Id. at 198–200, 84 S.Ct. at 1216–17 (White, J., dissenting). Despite the difference between the majority and dissenters regarding the need for express congressional authorization for suits against the state, the *Parden* Court recognized that where Congress under its commerce power had authorized private suits against a state engaging in certain conduct and the state continued that conduct, the state necessarily had consented to be sued.

Employees of the Department of Public Health & Welfare v. Department of Public Health & Welfare, 411 U.S. 279, 93 S.Ct. 1614, 36 L.Ed.2d 251 (1973), was the next case to confront the Court with a conflict between a congressionally-created cause of action and a state's claim of sovereign immunity. There, state hospital and training

school employees brought suit against the state of Missouri for overtime compensation, liquidated damages, and attorneys' fees under the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201–19 (1976). The Court held that although the FLSA literally included the plaintiffs, Congress had not expressly "brought the States to heel, in the sense of lifting their immunity from suit in a federal court" by explicitly making them subject to suit. *Id.* at 283, 93 S.Ct. at 1617. *Parden* was distinguished as an isolated case of state activity conducted for profit, where a lesser showing of congressional authorization for suit was acceptable. Although recognizing that Congress had the power under the commerce clause to further national policy goals in a manner that may "place new or even enormous fiscal burdens on the States," *id.* at 284, 93 S.Ct. at 1618, the Court concluded that

> [i]t is not easy to infer that Congress in legislating pursuant to the Commerce Clause . . . desired silently to deprive the States of an immunity they have long enjoyed under another part of the Constitution. Thus, we cannot conclude that Congress conditioned the operation of these facilities on the forfeiture of immunity from suit in a federal forum.

Id. at 285, 93 S.Ct. at 1618. *Employees*, then, followed an approach similar to that taken by the dissenters in *Parden*, implicitly acknowledging the dual role between congressional authorization, although now more explicit, and a state's consent.

Justice Marshall, joined by Justice Stewart, concurred in the result in a separate opinion. They felt the proper analysis of the case required consideration of two distinct questions: (1) whether Congress had effectively lifted the state's protective veil of sovereign immunity, and (2) whether the federal judicial power extended to a suit against the state even if Congress had removed the state's immunity. In their view, the majority opinion conveyed the impression that the two questions were a single inquiry. In answering the first question, the concurrence observed that the states had surrendered part of their sovereignty to the federal government when the Union was formed, thereby allowing Congress to remove their immunity from suit. This, in the concurring Justices' view, Congress had done under the FLSA. However, in answering whether the federal judiciary could enforce against a state rights created under the FLSA, the Justices would not have found that Missouri had given the requisite consent to allow federal court enforcement.

> Here the State was fully engaged in the operation of the affected hospitals and schools at the time [the FLSA was made applicable to them]. To suggest that the State had the choice of either ceasing operation of these vital public services or "consenting" to federal suit suffices, I believe, to demonstrate that the State had no true choice at all and thereby that the State did not voluntarily consent to the exercise of federal jurisdiction in this case.

Id. at 296, 93 S.Ct. at 1624. Justices Marshall and Stewart read the Court's opinion as merging the two inquiries, focusing mainly on the power of Congress to lift a state's immunity from suit without adequately considering the need for a state's consent to suit. This reading would later prove accurate.

The next major case to consider the effect of the eleventh amendment was *Edelman v. Jordan*, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974), a class action against Illinois officials who were administering programs of Aid to the Aged, Blind, or Disabled (AABD). Plaintiffs charged that state officials were delaying the processing of welfare benefits applications in violation of federal regulations under the Social Security Act, resulting in the wrongful withholding of welfare benefits. The Court allowed purely prospective injunctive relief on the basis of *Ex parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908), but found that the eleventh amendment barred the award of any retroactive payment of the wrongfully withheld statutory benefits. Justice Rehnquist, writing for the majority, criticized the court of appeals's application of the doctrine of constructive consent to find that Illinois, by participating in the

AABD program, had waived its eleventh amendment immunity.[10]

> Both *Parden* and *Employees* involved a congressional enactment which by its terms authorized suit by designated plaintiffs against a general class of defendants which literally included States or state instrumentalities. . . . The question of waiver or consent under the Eleventh Amendment was found in those cases to turn on whether Congress had intended to abrogate the immunity in question, and whether the State by its participation in the program authorized by Congress had in effect consented to the abrogation of that immunity.
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> But in this case the threshold fact of congressional authorization to sue a class of defendants which literally includes States is wholly absent. . . .
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> . . . Constructive consent is not a doctrine commonly associated with the surrender of constitutional rights, and we see no place for it here. In deciding whether a State has waived its constitutional protection under the Eleventh Amendment, we will find waiver only where stated "by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction." *Murray v. Wilson Distilling Co.*, 213 U.S. 151, 171, 29 S.Ct. 458, 464, 53 L.Ed. 742 (1909). We see no reason to retreat from the Court's statement in *Great Northern Life Insurance Co. v. Read*, 322 U.S. [47], at 54, 64 S.Ct. 873, 877, 88 L.Ed. 1121 (footnote omitted):
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> "[W]hen we are dealing with the sovereign exemption from judicial interference in the vital field of financial administration a clear declaration of the state's intention to submit its fiscal problems to other courts than those of its own creation must be found."
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> The mere fact that a State participates in a program through which the Federal Government provides assistance for the operation by the State of a system of public aid is not sufficient to establish consent on the part of the State to be sued in the federal courts.

Edelman v. Jordan, 415 U.S. at 672–73, 94 S.Ct. at 1360–61.[11] While again recognizing the need for a state's consent to be sued, language in the opinion hinted at the sufficiency of explicit congressional authorization alone. In finding that the only sanction in the Social Security Act against noncomplying states was the termination of federal funds, the Court concluded that "[t]his provision by its terms did not authorize suit against anyone, and standing alone, fell far short of a waiver by a participating State of its Eleventh Amendment immunity." *Id.* at 674, 94 S.Ct. at 1361.

The Court's language in *Edelman* strongly implies that Congress can force a constructive consent by a state whenever Congress specifically authorizes private actions against the state. This approach expressly was taken by the Court in *Fitzpatrick v. Bitzer*, 427 U.S. 445, 96 S.Ct. 2666, 49 L.Ed.2d 614 (1976), where male state employees sued the state of Connecticut alleging sex-based employment discrimination in

10. The court of appeals, 472 F.2d 985 (7th Cir. 1973), had relied upon the Court's holding in *Parden* and the dissenting opinion to the court of appeals decision in *Employees*, 452 F.2d 820, 827 (8th Cir. 1971) (Bright, J., dissenting), to find that a state could waive its immunity by constructive, as well as actual, consent.

11. Four Justices disagreed with the result reached by the majority. Justice Douglas saw the award of retroactive relief against the state as entirely consistent with prior rulings by the Court and regarded the state's participation in a federal-state cooperative project as sufficient consent by the state to assume the obligations under the program. 415 U.S. at 678–687, 94 S.Ct. at 1363–67. In Justice Brennan's view, the only issue was whether Illinois could assert its sovereign immunity, rather than the eleventh amendment, as a bar; he concluded that Illinois had surrendered such immunity when the Union was formed. Therefore, no immunity existed that required either express congressional authorization of suit or a consent by the state. *Id.* at 687–88, 94 S.Ct. at 1367–68. Justice Marshall, joined by Justice Blackmun, found sufficient congressional authorization in 42 U.S.C. § 1983 suits, and also determined that the state's voluntary participation in and agreement to comply with the AABD program was a waiver of the state's eleventh amendment immunity. *Id.* at 688–696, 94 S.Ct. at 1368–72.

the state's statutory retirement benefit plan. The employees sought both prospective and retroactive relief and attorneys' fees under the 1972 amendments to Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e–17 (1976). The case squarely presented the question whether section 5 of the fourteenth amendment empowered Congress to authorize federal courts to assess money damages against a state in favor of private individuals despite the shield of the eleventh amendment. Justice Rehnquist, again writing for the Court, found that the prerequisite congressional authorization to sue the state was clearly present in the amendments making Title VII of the Civil Rights Act applicable to state and local governments. The Court focused on the source of the congressional power, relying upon the powers given Congress under section 5 to enforce the substantive provisions of the fourteenth amendment.

> [Supreme Court cases have] sanctioned intrusions by Congress, acting under the Civil War Amendments, into the judicial, executive, and legislative spheres of autonomy previously reserved to the States. The legislation considered in each case was grounded on the expansion of Congress' powers—with the corresponding diminution of state sovereignty—found to be intended by the Framers and made part of the Constitution upon the States' ratification of those Amendments, a phenomenon aptly described as a "carv[ing] out" in *Ex parte State of Virginia* [100 U.S. 339, 346, 25 L.Ed. 676, 679 (1880)].

Fitzpatrick v. Bitzer, 427 U.S. at 455–56, 96 S.Ct. at 2671. The necessity for a state's consent to suit was not addressed specifically, since the inherent cession of state sovereignty to Congress in the passage of the fourteenth amendment, coupled with the express congressional authorization, superseded the eleventh amendment bar. The Court did suggest, without explanation, that this analysis could be unique to the Civil War amendments:

> We think that Congress may, in determining what is "appropriate legislation" for the purpose of enforcing the provisions of the Fourteenth Amendment, provide for private suits against States or state officials which are constitutionally impermissible in other contexts. See *Edelman v. Jordan*, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed. 662 (1974); *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459, 65 S.Ct. 347, 89 L.Ed. 389 (1945).[12]

Id. at 456, 96 S.Ct. at 2671 (footnote omitted). Such an approach would be logical in that the states would have consented to suit in federal court through their ratification of the fourteenth amendment, making the eleventh amendment no bar whatsoever. In essence, then, the only question would be one of statutory construction as to whether Congress intended to make the states amenable to private damage actions. While this approach is logically appealing, later cases have undermined its rationale.

Section 5 of the fourteenth amendment again was relied upon by Congress in passing the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 (1976), authorizing fee awards against the states when state officials were sued in their official capacities. The Court addressed the amenability of states to these fee awards in *Hutto v. Finney*, 437 U.S. 678, 98 S.Ct. 2565, 57 L.Ed.2d 522 (1978), a suit by prison inmates contesting the conditions of their confinement under the eighth and fourteenth amendments. Even though no explicit statutory language imposed liability upon the states, Justice Stevens, joined by four other Justices, found that the legislative history indicated an intent by Congress to make the states liable for these litigation expenses. The Court's approach, however, went beyond mere statutory interpretation.

12. The cases cited by the Court involved suits lacking explicit congressional authorization of private damage actions against the states. Later, in *Hutto v. Finney*, 437 U.S. 678, 98 S.Ct. 2565, 57 L.Ed.2d 522 (1978), discussed *infra*, the Court used the rationale of *Fitzpatrick* to bolster its finding of sufficient congressional authorization to impose attorneys' fees against the states even though no explicit congressional authorization existed. *Id.* at n.31, 98 S.Ct. at 2578.

Instead, the Court considered Congress's plenary power under section 5 to *abrogate* a state's eleventh amendment immunity. If statutory interpretation were the only consideration, the focus would have been to determine if Congress intended the statute to apply to the states; there would be no need to address the eleventh amendment issue. If Congress still needed intentionally to *abrogate* the state's eleventh amendment immunity, however, the ratification of the Civil War amendments had not already done so. Thus, the Court acknowledged that the eleventh amendment could still bar suit in federal court where Congress had acted under section 5. The inquiry, then, turned to how clearly Congress had intended to abrogate the state's eleventh amendment immunity. The majority found that congressional abrogation of a state's immunity did not need to be explicit where only the award of litigation expenses was involved, but implied that the abrogation of a state's immunity would have to be more express where enormous financial consequences to the states might be involved. *Id.* at 697 n.27, 98 S.Ct. at 2577. Again, the necessity for a state's consent was not addressed.[13]

Only recently the Court again addressed the question of congressional abrogation of a state's immunity in *Quern v. Jordan*, —— U.S. ——, 99 S.Ct. 1139, 59 L.Ed.2d 358 (1979), the sequel to *Edelman*. There the issue was whether a federal court could order state officials to send an explanatory notice advising those who had been deprived of their welfare benefits that administrative procedures were available to determine their rights to past welfare benefits. In reaffirming the watershed between prospective and retroactive relief relied upon in *Edelman*, the Court found that the proposed notice constituted permissible prospective relief and not an unconstitutional retroactive award requiring payment from the state treasury. In so holding, the Court readdressed the argument whether 42 U.S.C. § 1983 (1976), enacted pursuant to section 5 of the fourteenth amendment, constitutes a sufficient congressional authorization to abrogate a state's eleventh amendment immunity. Again the Court, in tracing its holdings from *Employees* through *Hutto*, focused on the explicitness of the congressional purpose to remove a state's immunity from suit. The requisite congressional authorization could not be found in *Quern*.

> [Section] 1983 does not explicitly and by clear language indicate on its face an intent to sweep away the immunity of the states; nor does it have a history which focuses directly on the question of state liability and which shows that Congress considered and firmly decided to abrogate the Eleventh Amendment immunity of the States.

—— U.S. ——, 99 S.Ct. at 1147. Even for legislation enforcing the fourteenth amendment, the eleventh amendment barrier remained because Congress had not indicated a sufficient purpose to remove the state's eleventh amendment immunity.

[4] With these decisions in mind, we now address the reemployment provisions of the statute before us. We conclude that the Act "shows that Congress considered

13. Justice Powell, joined by the Chief Justice, Justice White and Justice Rehnquist, dissented from the holding permitting counsel fee awards against a state where Congress had not statutorily waived the state's immunity through express language. These Justices, consistent with the majority, saw the eleventh amendment as a bar to this suit, even when Congress had acted pursuant to the fourteenth amendment, but unlike the majority, would have required an explicit waiver. *Id.* at 704, 98 S.Ct. at 2581–84. Justice Rehnquist, joined by Justice White, also dissented on the ability of Congress to enforce constitutional provisions, *e. g.* the cruel and unusual punishment provision of the eighth amendment, not specifically contained in the fourteenth amendment by using § 5 of the fourteenth amendment to abrogate a state's immunity. In *Hutto*, he pointed out, the fourteenth amendment was applied solely for the purpose of allowing the plaintiffs' eighth amendment claim to be made against the state; nothing in the plaintiffs' alleged cause of action had its roots in the fourteenth amendment's direct prohibitions against the states. In *Fitzpatrick*, by contrast, the claimed violation was based on the equal protection clause of the fourteenth amendment. *Id.* at 717, 98 S.Ct. at 2588.

and firmly decided to abrogate the Eleventh Amendment immunity of the States." *Id.* Indeed, section 2022 expressly authorizes a suit in federal district court against a state to achieve compliance with the Act and to provide compensation for lost wages and benefits. The "threshold fact of congressional authorization" is clearly present. *Edelman*, 415 U.S. at 672, 94 S.Ct. at 1360.

[5] We are well aware that *Fitzpatrick* and *Hutto* involved the power of Congress under section 5 of the fourteenth amendment whereas the Act challenged here is founded on Congress's war power under article I. However, we are persuaded that nothing in the history of the eleventh amendment, the doctrine of sovereign immunity, or the case law indicates that Congress, when acting under an article I, section 8 delegated power, lacks the authority to provide for federal court enforcement of private damage actions against the states.[14]

[6] As our analysis of the cases interpreting the eleventh amendment immunity has indicated, the primary focus has been whether Congress has expressed a sufficient desire to subject the states to suit. A finding of the prerequisite voluntary state consent to suit, so essential to a federal court's jurisdiction in the early cases, has been noticeably absent in the Court's recent cases of *Fitzpatrick* and *Hutto*.[15] Although this absence could have been justified on the theory that the legislation in those cases had been passed pursuant to section 5 of the fourteenth amendment, the ratification of which removed the eleventh amendment as a bar, such a rationale is inconsistent with the approach in *Hutto* and *Quern* that Congress must act affirmatively to remove the state's eleventh amendment immunity.

Another possible rationale for the Court's *sub silentio* merging of the separate state consent requirement into the single inquiry of whether Congress has statutorily waived the state's immunity is that in every case the state necessarily continued the conduct covered by the statute, thus furnishing the grounds for the suit against the state. From this perspective, a state that continued such conduct would have consented to suit whenever the statute was found to have authorized suits against it. In this case, the state of Florida would be found to have consented to suit by continuing to employ Peel after being put on notice by the Act that employees must be rehired upon their return from military training. A finding of a state's waiver of its immunity in this manner, however, is a far cry from the voluntary consent suggested by the Court in its earlier decisions.

A more consistent rationale is that a state consents to private damage actions when *Congress* manifests a sufficient purpose to abrogate a state's immunity. Under this approach, the state waived its immunity from suit in federal court at the same time it surrendered its sovereign immunity and gave Congress the power to legislate under delegated powers. As recognized by Chief Justice Hughes in an early case involving sovereign immunity, "States of the Union, still possessing attributes of sovereignty, shall be immune from suits, without their consent, save where there has been 'a surrender of this immunity in the plan of the convention.'" *Monaco v. Mississippi*, 292 U.S. 313, 322–23, 54 S.Ct. 745, 748, 78 L.Ed. 1282 (1934) (quoting The Federalist No. 81 (A. Hamilton)) (footnote omitted). This rationale removes the eleventh amendment as a bar whenever Congress validly has exercised its powers.

"[I]n exercising her rights, a State cannot disregard the limitations which the Fed-

14. This conclusion is supported by commentators, who have concluded that the eleventh amendment should be read as a limitation on the judicial power to imply private damage remedies, but not as a constraint on valid exercises of congressional powers. *See* Field, *supra* note 9, at 1239; Nowak, *supra* note 9, at 1442; Tribe, *supra* note 9, at 693–94.

15. A voluntary state consent to suit may still be essential where Congress has not indicated a sufficient intent to abrogate a state's immunity but has made legislation literally applicable to the state. *See Edelman*, 415 U.S. at 673, 94 S.Ct. at 1360–61; *Employees*, 411 U.S. at 283, 93 S.Ct. at 1617. In such a case, the state could still voluntarily consent to suit by a private litigant.

eral Constitution has applied to her power. Her rights do not reach to that extent. Nor can she deny to the general government the right to exercise all its granted powers, though they may interfere with the full enjoyment of the rights she would have if those powers had not been thus granted. Indeed, every addition of power to the general government involves a corresponding diminution of the governmental powers of the States. It is carved out of them."

Fitzpatrick, 427 U.S. at 454–55, 96 S.Ct. 2670–71 (quoting *Ex parte Virginia*, 100 U.S. 339, 346–48, 25 L.Ed. 676 (1880)). Congress still must indicate a sufficient intent to subject the states to suit. Hence, this approach construes the eleventh amendment as a check on the judicial power to imply private damage remedies against the states without sufficient congressional action.

[7, 8] In both *Parden* and *Employees*, the Court recognized that Congress has the power to bring "the States to heel, in the sense of lifting their immunity from suit in a federal court," *Employees*, 411 U.S. at 283, 93 S.Ct. at 1617, under another article I power, the commerce clause. Similarly, Congress should be able to remove a state's eleventh amendment immunity under its war power. The responsibility for the defense of the Union was delegated to Congress. "The war power of the federal government is its supreme power. When it is in action it is transcendent." *St. Johns River Shipbuilding Co. v. Adams*, 164 F.2d 1012, 1015 (5th Cir. 1947). To hold that the eleventh amendment bars Peel's claim in this case would be to remove the states from the reach of any legitimate exercise of one of the central powers given by the states to the federal government.

> '[T]he Constitution is not self-destructive. In other words, that power which it confers on the one hand it does not immediately take away on the other . . . .' [*Billings v. United States*, 232 U.S. 261, 282, 34 S.Ct. 421, 424, 58 L.Ed. 596 (1914)] . . . *[I]t may be said that the power has been expressly given to Congress to prosecute war, and to pass all laws which shall be necessary and proper for carrying that power into execution. That power explicitly conferred and absolutely essential to the safety of the Nation is not destroyed or impaired by any later provision of the constitution or by any one of the amendments.* These may be construed so as to avoid making the constitution self-destructive, so as to preserve the rights of the citizen from unwarrantable attack, while assuring beyond all hazard the common defense and the perpetuity of our liberties. These rest upon the preservation of our nation.

Lichter v. United States, 334 U.S. 742, 781, 68 S.Ct. 1294, 1314–15, 92 L.Ed. 1694 (1948) (quoting an address by Hon. C. Hughes) (emphasis added). Here, the Act authorizing suit against the state was within the legitimate scope of the war power, since Congress was providing veterans with assistance in readjusting to civilian life. *See Johnson v. Robinson*, 415 U.S. 361, 377, 94 S.Ct. 1160, 1170–71, 39 L.Ed.2d 389 (1974); *Carter v. United States*, 32 U.S.App.D.C. 303, 308, 407 F.2d 1238, 1243 (1968). Accordingly, the Act's authorization of enforcement suits is not barred by the eleventh amendment.

[9] Our result is consistent with that reached by other courts that have addressed the ability of Congress under its war power to subject states to private suits by its own citizens. *See Jennings v. Illinois Office of Education*, 589 F.2d 935 (7th Cir.), *cert. denied*, —— U.S. ——, 99 S.Ct. 2417, 60 L.Ed.2d 1073 (1979); *Moore v. Kansas*, No. 78–1079 (D.Kan. May 31, 1979); *Camacho v. Public Service Commission*, 450 F.Supp. 231 (D.P.R.1978); *Schaller v. Board of Education*, 449 F.Supp. 30 (N.D.Ohio 1978). Whether we maintain the fiction that Congress has compelled a state's "consent" to suit or conclude that consent is unnecessary when Congress has explicitly abrogated a state's immunity, the result in this case is the same: the express language in the Act authorizing suits against the states is sufficient to overcome the potential bar of the eleventh amendment. Because we hold that Congress expressly lifted the state of

Florida's eleventh amendment immunity in this case, we need not distinguish between retroactive and prospective relief. Both the award of lost wages and benefits and the reinstatement of Peel are appropriate forms of relief authorized by Congress. *See Fitzpatrick*, 427 U.S. at 456–57, 96 S.Ct. at 2671–72.

B. *The Tenth Amendment*

Although we have concluded that the eleventh amendment is not a limitation where Congress, acting pursuant to its war power, has lifted the state's immunity, we now must turn to the related issue of whether the tenth amendment is a limitation on the exercise of this same power. The tenth amendment reserves to the states all powers that are neither delegated to the United States nor prohibited to the states.

> While the Tenth Amendment has been characterized as a "truism," stating merely that "all is retained which has not been surrendered," . . . it is not without significance. The Amendment expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system.

Fry v. United States, 421 U.S. 542, 547 n.7, 95 S.Ct. 1792, 1795–96, 44 L.Ed.2d 363 (1975) (citation omitted).

Appellants argue that the principles of federalism inherent in the tenth amendment as articulated in *National League of Cities v. Usery*, 426 U.S. 833, 96 S.Ct. 2465, 49 L.Ed.2d 245 (1976), require us to invalidate the extension of the reemployment provisions of the Act to state and local governments. In *National League of Cities*, the Court recognized that the tenth amendment prohibited an otherwise valid exercise of congressional power because Congress had attempted "to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions." *Id.* at 852, 96 S.Ct. at 2474. At issue was the validity of the 1974 amendments to the Fair Labor Standards Act (FLSA), 29 U.S.C. § 203(d), (s)(5), (x) (1976), which extended the FLSA's minimum wage and maximum hour provisions to almost all employees of states and their political subdivisions. While recognizing that the commerce power under article I is a grant of plenary authority to Congress, the Court distinguished the regulation of private activity from the regulation of states, finding the latter constrained by the constitutional considerations of federalism embodied in the tenth amendment. Because the 1974 amendments would "impermissibly interfere with the integral governmental functions" of the states and their political subdivisions, 426 U.S. at 851, 96 S.Ct. at 2474, the attempted extension of the FLSA was not within the authority granted Congress by the commerce clause.

We are faced with interpreting *National League of Cities* in the context of an otherwise valid exercise by Congress of its war power. This issue was specifically left unresolved in a footnote to the plurality opinion by Justice Rehnquist, although the footnote attempts to distinguish the war power:

> It also seems appropriate to note that *Case v. Bowles*, 327 U.S. 92, 66 S.Ct. 438, 90 L.Ed. 552 (1946), has not been overruled as the dissent asserts. Indeed that decision . . . has no direct application to the questions we consider today at all. For there the Court sustained an application of the Emergency Price Control Act to a sale of timber by the State of Washington, expressly noting that the "only question is whether the state's power to make the sales must be in subordination to the power of Congress to fix maximum prices in order to carry on war." *Id.* at 102, 66 S.Ct. at 443. The Court rejected the state's claim of immunity on the ground that sustaining it would impermissibly "impair a prime purpose of the federal government's establishment." *Ibid.* Nothing we say in this opinion addresses the scope of Congress' authority under its war power.

Id. at 854 n.18, 96 S.Ct. at 2475–76. Similarly, the Court was careful to state that it remained open on the question of the extent to which Congress could properly af-

fect integral state functions under its spending power or section 5 of the fourteenth amendment. *Id.* at 852 n.17, 96 S.Ct. at 2474.

In light of these qualifications, *National League of Cities* has been interpreted as an attempt to limit the commerce power rather than all the powers delegated to Congress. *See, e.g., City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 423, 98 S.Ct. 1123, 1142, 55 L.Ed.2d 364 (1978) (Burger, C. J., concurring); *Marshall v. Owensboro-Daviess County Hospital*, 581 F.2d 116, 119 (6th Cir. 1978); *United States v. City of Chicago*, 573 F.2d 416, 424 (7th Cir. 1978); *Arritt v. Grisell*, 567 F.2d 1267, 1270 (4th Cir. 1977). However, since the Court left unanswered the effect of the tenth amendment on the exercise of Congress's war power, we must examine this issue.

[10] The policies of federalism underlying the decision in *National League of Cities* likewise must be considered when an exercise of the congressional war power may "directly displace the State's freedom to structure integral operations in areas of traditional governmental functions." 426 U.S. at 852, 96 S.Ct. at 2474. In determining whether the congressional action violates the limitations of the tenth amendment, we must assess and weigh the source of the congressional power and the legitimacy of its exercise against the degree to which it interferes with integral governmental functions of the states and political subdivisions. Where the legitimate exercise of a power delegated to Congress outweighs the interference with the state's self-determination in providing its essential public services, the tenth amendment is no bar to congressional action.

[11] Here we must balance the exercise of Congress's war power against the impact of the Act's reemployment provisions on Florida's integral governmental functions. These functions include Florida's ability to structure employer-employee relationships in

> such areas as fire prevention, police protection, sanitation, public health, and parks and recreation. These activities are typical of those performed by state and local governments in discharging their dual functions of administering the public law and furnishing public services.

Id. at 851, 96 S.Ct. at 2474. Overseeing the transportation system of the state has traditionally been one of the functions of state government, and thus appears to be within the activities protected by the tenth amendment. *Cf. United States v. Best*, 573 F.2d 1095, 1102–03 (9th Cir. 1978) (licensing of drivers constitutes an integral state function). *But cf. Friends of the Earth v. Carey*, 552 F.2d 25, 38–39 (2d Cir.) (regulation of traffic on roads and highways to control air pollution is joint effort among federal, state, and local governments and therefore cannot be considered an integral state governmental function), *cert. denied*, 434 U.S. 902, 98 S.Ct. 296, 54 L.Ed.2d 188 (1977). It also cannot be denied that the Act somewhat affects the state's ability to structure its employer-employee relationships. In balancing the interference with the state's ability to function effectively in our federal system against this exercise of Congress's war power, however, we are not convinced that the reemployment provisions of the Act "directly displace the States' freedom to structure integral operations in areas of traditional functions."

In *National League of Cities*, the Court considered the serious financial strains that the states and municipalities would have suffered if Congress could have extended the minimum wage and maximum hour requirements to nearly all their employees. These additional costs, the Court noted, would have resulted in a "forced relinquishment of important governmental activities." 426 U.S. at 847, 96 S.Ct. at 2472. Moreover, for those services that the state continued to provide, the FLSA requirements would have displaced state policies concerning the manner in which the states could structure the delivery of their services by imposing minimum wage scales and overtime requirements. The type of interference found in *National League of Cities* is not the same as that caused by the reemployment provisions of the Act. The Act

merely prevents the state from denying a person his employment rights because of military obligations, a person whom the state itself had previously hired. *Cf. Hyland v. Fukuda*, 580 F.2d 977, 981 n.5 (9th Cir. 1978) (federal statute which prevents the state's selection of certain persons for prison guards not a violation of the tenth amendment).

[12, 13] Providing reemployment rights for those who have been called to the service of their country is, in our view, a legitimate exercise of Congress's power to raise armies. *See Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 284, 66 S.Ct. 1105, 1111, 90 L.Ed. 1230 (1946); *cf. Case v. Bowles*, 327 U.S. 92, 66 S.Ct. 438, 90 L.Ed. 552 (1946) (price controls considered valid exercise of war power). The war power, as discussed previously, is one of the vital powers of Congress, essential to the protection of the nation. Where, as in this case, Congress has acted in a direct manner under its war power and has not unduly encroached upon the state's integral governmental functions, the tenth amendment is not a limitation on its power.[16] *Cf. United States v. Oregon*, 366 U.S. 643, 81 S.Ct. 1278, 6 L.Ed.2d 575 (1961); *New York v. United States* (*In re Levy*), 574 F.2d 128, 131 n.6 (2d Cir. 1978) (tenth amendment not violated by federal statute enacted under war power providing that property of veteran who dies intestate and without next of kin while a patient in a veteran's hospital shall vest in the United States).

This balancing approach is consistent with the results reached by other courts that have considered the tenth amendment's relationship to congressional action. As made clear in his concurrence in *National League of Cities*, Justice Blackmun's deciding vote was premised on his understanding that the Court had adopted a balancing approach to determine the validity of federal interference with state functions. 426 U.S. at 856, 96 S.Ct. at 2476.

16. We do not hold that any exercise of Congress's war power will be immune from the limitations of the tenth amendment. Were Congress to act without a strong nexus to the war power and attempt to displace those activities traditionally left to state and local governments, a different case would be presented.

[14] When a situation arises that threatens national interests, the federal interest naturally increases. This was the case in *Fry v. United States*, 421 U.S. 542, 95 S.Ct. 1792, 44 L.Ed.2d 363 (1975), where the Court upheld the President's authority under the Economic Stabilization Act of 1970, Pub.L.No.91-379, 84 Stat. 799 (expired 1974) to combat severe inflation by enjoining the state of Ohio from paying statutory wage and salary increases. Because the congressional measure was a response to an emergency situation and whose effectiveness would be drastically impaired if it were inapplicable to state and local governmental employees, the federal intrusion did not violate the tenth amendment. The court in *National League of Cities* found that its holding was entirely consistent with *Fry*, noting that the effect of the price control measures in *Fry* displaced no state choices as to the structure of governmental operations. "Instead, it merely required that wage scales and employment relationships which the states themselves had chosen be maintained during the period of the emergency." 426 U.S. at 853, 96 S.Ct. at 2475. Where collective action becomes necessary to deal with serious national problems, the protected area of state sovereignty must give way to congressional mandate.

[15] Even nonemergency exercises of the commerce power, the source of the amendments invalidated in *National League of Cities*, outweigh state interests in certain circumstances. In *Friends of the Earth v. Carey*, 552 F.2d 25 (2d Cir.), *cert. denied*, 434 U.S. 902, 98 S.Ct. 296, 54 L.Ed.2d 188 (1977), the Second Circuit found that the enforcement of state plans under the Clean Air Amendments of 1970, 42 U.S.C.A. §§ 7410, 7604 (Supp.1978), neither impermissibly interfered with integral state functions nor usurped state and municipal decisionmaking, even though their enforcement would involve changes in traffic programs, licensing procedures, parking

regulations and would require the city of New York to provide funds for toll facilities and garages. Since the policy choices involved in developing a plan to meet the federal requirements were left to the state and political subdivisions, no impermissible federal interference with state functions was found.

Similarly, this court has upheld the extension of the Equal Pay Act of 1963, 29 U.S.C. § 206(d) (1976), to state and local government employees as a valid exercise of Congress's power under the commerce clause, finding that the intrusion into the area of state sovereignty was permissible. *Pearce v. Wichita County*, 590 F.2d 128 (5th Cir. 1979); *accord, Marshall v. City of Sheboygan*, 577 F.2d 1 (7th Cir. 1978). Other courts have reached the same result, but have placed their reliance on section 5 of the fourteenth amendment as the source of congressional power, finding it not subject to tenth amendment limitation. *Marshall v. Owensboro-Daviess County Hospital*, 581 F.2d 116 (6th Cir. 1978); *Usery v. Charleston County School District*, 558 F.2d 1169 (4th Cir. 1977); *Usery v. Allegheny County Institution District*, 544 F.2d 148 (3d Cir. 1976), *cert. denied*, 430 U.S. 946, 97 S.Ct. 1582, 51 L.Ed.2d 793 (1977). Another court has relied on the fourteenth amendment to uphold the application of the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 630(b) (1976) *as amended by* Fair Labor Standards Amendments of 1974, Pub. L.No.93–259, 88 Stat. 55, to state and local governments. *Arritt v. Grisell*, 567 F.2d 1267 (4th Cir. 1977).

[16] Thus, by weighing the legitimate exercise of congressional power against the intrusion into areas of state sovereignty, the courts have determined whether the tenth amendment prevents congressional action. Here, we find the balance in favor of the reemployment provisions of the Act; therefore the tenth, like the eleventh amendment, is no bar to enforcing the remedies provided by the Act. Consequently, the judgment of the district court is

AFFIRMED.

Willie George REESE, Petitioner-Appellant,

v.

Louie L. WAINWRIGHT, Respondent-Appellee.

No. 78–2345.

United States Court of Appeals, Fifth Circuit.

Aug. 13, 1979.

Rehearing Denied Sept. 6, 1979.

State prisoner's petition for federal habeas corpus was denied by the United States District Court for the Southern District of Florida, at Miami, Joe Eaton, J., and petitioner appealed. The Court of Appeals, Charles Clark, Circuit Judge, held, inter alia, that: (1) expert evidence brought forward by petitioner to establish that he was insane at the time of the offense was equivocal and conflicting, and in viewing all the evidence at trial in light most favorable to the prosecution, a rational jury could have found beyond a reasonable doubt that petitioner was sane at the time of the offense, and (2) the record disclosed, in light of petitioner's past medical history, the opinion of psychiatric experts and petitioner's behavior during trial, that he was not denied any procedural rights he had under *Pate*, and that he failed to meet his habeas burden of producing facts which positively, unequivocally and clearly generated a real, substantial and legitimate doubt as to his actual competency during trial.

Affirmed.

1. Habeas Corpus ⇐92(1)

In federal habeas corpus cases challenging the sufficiency of the evidence adduced at a state court trial, the test which must be applied is whether, after viewing the evidence in light most favorable to the prosecution, any rational trier of fact could

APPENDIX B

S.Ct. at 1757, 29 L.Ed.2d at 263. Following a retrial, the jury might have concluded, as the original jury might have, that no liquidated damages, fee-generating statute like the FLSA was violated by the appellee.[5] Conversely, indications are that the appellants stood a chance of prevailing on their FLSA claim if the case were tried again.[6] It is not unlikely that the appellee agreed to pay attorney's fees, as calculated by the judge, in return for the appellants' agreement to take less than the double damages they would have received with a successful FLSA claim. The appellee has already benefited from the consent agreement in that it has settled the damages claim against it for less than it stood to lose at trial. It cannot now deny the validity of its agreement to pay some amount of attorney's fees nor can the judge refuse to award fees in disregard of the parties' express consent.

REVERSED and REMANDED for a determination of the amount of attorney's fees.

5. The individual judgments entered pursuant to the original jury verdict granted each appellant his unpaid wages plus his costs of action. Attorney's fees are not recoverable as costs, absent statutory authority, contractual provision or overriding public policy. *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975); *Hall v. Cole*, 412 U.S. 1, 93 S.Ct. 1943, 36 L.Ed.2d 702 (1973). Consequently, it is unlikely that the judgment for costs included attorney's fees, since no mention of statutory authority was made in the award.

6. The jury originally found violations of "the Davis-Bacon Act or the FLSA." (emphasis added). In a successful FLSA action, the court "shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action." 29 U.S.C.A. § 216(b) (1977). The original judgment apparently did not include those fees and the judge's order refers to a plaintiff's verdict rendered solely on the Davis-Bacon Act cause of action. However, given the verdict's wording, a second jury could have determined, consistent with the conclusion of the first jury, that FLSA violations had occurred. Furthermore, the appellants allege that the appellee's own records contain numerical data probative of FLSA violations.

David G. LEE, Plaintiff-Appellant,

v.

The CITY OF PENSACOLA, the Pensacola Police Department and the Civil Service Board for the City of Pensacola, Defendants-Appellees.

No. 79-3169.

United States Court of Appeals,
Fifth Circuit.
Unit B

Jan. 20, 1981.

The United States District Court for the Northern District of Florida, Winston E. Arnow, J., granted summary judgment in suit by police officer against city, and appeal was taken. The Court of Appeals, Tuttle, Circuit Judge, held that where city granted police officer who also held commission in the National Guard leave to take further military training, officer, without consulting city, negotiated with military for extension of training so he could complete additional aspects thereof, and officer, after obtaining extension from military, requested extension of leave from city and remained to complete military training after extension was denied, officer did not act reasonably and termination of his employment was proper.

Affirmed.

1. Armed Services ⇐115(7)

Statute relating to employer giving leave to member of reserve or National

Guard to take specialized training supplied by the military applies even though training may not be required. 38 U.S.C.A. §§ 2024, 2024(d).

2. Armed Services ⇐120

Where city granted police officer who also held commission in the National Guard leave to take further military training, officer, without consulting city, negotiated with military for extension of training so he could complete additional aspects thereof, and officer, after obtaining extension from military, requested extension of leave from city and remained to complete military training after extension was denied, officer did not act reasonably and termination of his employment was proper. 38 U.S.C.A. § 2024.

Barry W. Beroset, Pensacola, Fla., for plaintiff-appellant.

Thomas C. Staples, Asst. City Atty., Pensacola, Fla., for defendants-appellees.

Appeal from the United States District Court for the Northern District of Florida.

Before TUTTLE, GODBOLD and HILL, Circuit Judges.

TUTTLE, Circuit Judge:

The appellant here complains of the dismissal by the trial court of his suit against the City of Pensacola, his employer, for failing to grant him a leave of absence "for the period required to perform active duty for training" as an officer of the Florida National Guard.

As a preliminary to outlining the facts, about which there is no significant issue, it is helpful to note that the parties both agree that the appellant is entitled to whatever protection 38 U.S.C. § 2024 provides for any reserve or National Guard officer or enlisted person, when such person seeks a leave from his city or county employment to take specialized training provided and paid for by the United States Military Forces. This section, in relevant part states that such person:

> [S]hall upon request be granted a leave of absence by such person's employer for the period required to perform active duty for training or inactive duty training in the Armed Forces of the United States. Upon such employee's release from a period of such active duty for training or inactive duty training, ... such employee shall be permitted to return to such employee's position with such seniority, status, pay, and vacation as such employee would have had if such employee had not been absent for such purposes. Such employee shall report for work at the beginning of the next regularly scheduled working period after expiration of the last calendar day necessary to travel from the place of training to the place of employment following such employee's release, or within a reasonable time thereafter if delayed return is due to factors beyond the employee's control.

38 U.S.C. § 2024(d).

The appellant was a police officer of the City of Pensacola. He also held a commission as captain in the Florida Army National Guard, commanding a unit of the Guard. Under existing Army regulations, he could continue as a captain for an additional period of six years without any further training beyond that encompassed in the annual weekly drills and summer camps. However, the Army did afford a number of courses for persons of his rank and service to qualify him for continuation in the Guard if not promoted or for promotion to the rank of Major as vacancies might occur. Having previously unsuccessfully applied for such specialized training, Captain Lee took advantage of a vacancy which the Plans and Training Officer of his headquarters told him was available, and applied to his superior, the chief of police, for military leave to attend the Transportation Officer Advance Course for the National Guard at Ft. Eustis, Virginia running, as he thought, from August 8, 1978 to September 27, 1978.

This leave was granted and he was ordered on this duty for training.[1]

Shortly after Captain Lee's arrival at Ft. Eustis, he learned that the course had actually begun a week earlier and also learned that the course he was then enrolled in was known as phase five of a total of six phases in the training program. He also learned that if he made application to his National Guard or Army superiors he might receive an extended order to stay for the completion of the remaining phases of the entire course by February 21, 1979. After checking with a military legal adviser as to his employment rights if he should continue in the course, and after obtaining assurance from the proper Army authorities that he could continue, he wrote a letter to the chief of police in Pensacola, which was received by the latter on September 21, 1978, a few days before the expiration of the original leave of absence. In the letter, he asked for a leave to continue through February 21.

The chief of police responded by saying that the department could not carry him in a leave status for such a period of time, and that he had until October 6 "to resign your position with the Pensacola Police Department or we will be forced to carry you absent without leave and ask for your termination." Lee responded and asked the chief to reconsider in light of the provisions of the Veterans Reemployment Rights statutes, but instead he was notified that he had been suspended with a recommendation for his dismissal. The Civil Service Board for the City of Pensacola then held a hearing on December 12 and dismissed Lee effective October 11, 1978.

Following his National Guard training in February 1979, Lee requested reinstatement to his position with the Pensacola Police Department. This request was denied. The trial court accepted the city's argument that the application of the statute to the state of facts here depended upon what the city called a "rule of reason;" that is, that both the length of time of such a leave for training and the circumstances surrounding the request for it as well as the circumstances existing when the officer returned to seek reemployment, must all be reasonable under the circumstances. Although the court stated "the essential facts are not in dispute" the court later said:

> There was conflicting testimony as to whether plaintiff knew or suspected when he requested the 59 day leave that the entire course might be much longer. However, it is clear that prior to remaining on the extended leave plaintiff did not discuss the various options open to him for completing the course with any of his superiors in the Department in an effort to work out a satisfactory solution. Instead, he voluntarily extended his training duty to suit his own convenience.
>
> There is not involved here a situation in which plaintiff was denied the leave originally requested nor a situation in which plaintiff in time of war voluntarily resigned his position in order to be inducted into the armed services. On the other hand, it is also not a situation in which plaintiff voluntarily extended his military commitment for years after he could have been relieved of such obligation.

The court stated:

> As cases cited by defendants point out, Congress, in amending the Act, intended to prevent discrimination in employment as a result of a reservist's military obligation but it did not intend thereby to endow a reservist with unreasonable powers over his employer or cause his employer unreasonable hardship. The training period for which leave of absence is given must be reasonable both in the context of the reservist's military obligation and the requirements of the employer. As pointed out in *Peel v. Florida Department of Transportation*, 443 F.Supp. 451 (N.D.Fla. 1977) at page 455, the congressional history indicates § 2024(d) was designed to

1. The record does not disclose whether this was "active duty for training" or "inactive duty for training." 38 U.S.C. § 2024(d).

accommodate trainees absent from employment for periods lasting 30, 60, or 90 days.

In short summary, defendants granted plaintiff the leave requested for the period required to complete one phase of a course consisting of several phases. There was no requirement that plaintiff complete all the phases at that time. In enacting § 2024(d) it could not have been the intent of Congress to permit employees who have been granted military leave to remain on such leave unnecessarily and at their own convenience to the detriment of the legitimate concerns of their employers. The court concludes defendants have not violated plaintiff's veteran's reemployment rights and plaintiff is entitled to no relief.

Lee contends that the statute is plain and without any limitations as to the length of time for which a leave for active duty training must be restricted. However, he agrees with the City that a rule of reason applies.[2] He claims that under the circumstances here his request for extended leave was entirely reasonable.

Both parties concede that there are no precedents by which we are bound in our interpretation of this section involving the reemployment rights. It has repeatedly been said that the acts of Congress providing for reemployment of military persons are to be construed liberally in favor of the veteran. *Smith v. Missouri Pacific Transportation Co.*, 313 F.2d 676 (8th Cir. 1963); *citing Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285, 66 S.Ct. 1105, 1111, 90 L.Ed. 1230 (1946); *Rix v. Turnbull-Novak, Inc.*, 260 F.2d 785 (8th Cir. 1958); *see Boone v. Lightner*, 319 U.S. 561, 575, 63 S.Ct. 1223, 1231, 87 L.Ed. 1587 (1942).

[1] Lee relies heavily on the case arising in the same district, *Peel v. Florida Dept. of Transportation*, 443 F.Supp. 451 (N.D.Fla. 1977), *aff'd* 600 F.2d 1070 (5th Cir. 1979), to support his argument that his training duty does not have to be "required" to qualify him to the benefits under § 2024(d). We agree that this section applies to training duty whether required or not. However, the *Peel* court did not deal with the question of reasonableness.

Here, the record discloses that for several weeks prior to his application for an extension of the leave for an additional four months, Lee was negotiating with his military superiors to ascertain whether they would extend his period of training beyond the original leave which he had requested and obtained. Yet he had no communication with the police department to indicate that he was seeking such extension of his training period. He waited until he received actual orders amending the original training orders before he communicated with the police department. He did not discuss with his civilian employer the fact that it was not necessary for him to complete the entire six phases of the course during this particular year, but that he could seek additional periods of training in subsequent years or that he could qualify for promotion by satisfactorily completing correspondence courses dealing with the subject matter of the Ft. Eustis school. Moreover, even after he had been notified by the chief of police that his leave would not be extended, he did not even then undertake to discuss with his employer the opportunities which were available to him, but simply stated that he intended to continue his absence from his civilian duties. He completely ignored the difficulties faced by the City in carrying out its important police duties.

2. On page 18 of his brief here, Lee says: "It is the Appellant's contention that a reasonable time must be considered under the circumstances and facts of his case and that his leave from August 8, 1978, until February 21, 1979, is reasonable under the circumstances of this case."

On page 21 of his brief, he says: "The Appellant, like any lay individual, who relies upon a statute, generally does not have access to the legislative history or the applicable case law. The test here is 'reasonableness' and under the circumstances of this case, the Appellant's requested extension for training was reasonable and his reemployment rights should be protected under 38 U.S.C. § 2021 et seq."

[2] Under the circumstances of this case, it is clear that we cannot conclude that the trial court was clearly erroneous in its determination that Lee's conduct did not meet the rule of reasonableness that he acknowledges is binding in such a situation.

The judgment is AFFIRMED.

Mae Ella Johnson COTLONG, in her capacity as Natural Tutrix of her minor child, Samantha E. Johnson, Plaintiff-Appellant,

v.

Patricia Roberts HARRIS, Secretary of Health and Human Services, Defendant-Appellee.

No. 79-3799.

United States Court of Appeals, Fifth Circuit.
Unit A

Jan. 20, 1981.

Mother of an illegitimate child sought judicial review of a denial by the Secretary of Health, Education and Welfare of child's insurance benefits under the Social Security Act. Action was dismissed by the United States District Court for the Western District of Louisiana at Lafayette, W. Eugene Davis, J., and the claimant appealed. The Court of Appeals, Tate, Circuit Judge, held that the illegitimate child fell within class of illegitimate children statutorily presumed to be dependent because entitled under law to inherit from insured decedent in event of latter's intestacy, and entitlement to benefits was not affected by circumstances that she would in fact inherit nothing because her individual claim to inherit was primed by surviving spouse and that she would in fact receive nothing by intestacy, even if her deceased father had in fact owned any property.

Vacated and remanded.

1. Social Security and Public Welfare ⇐137

For purpose of child's insurance benefits under Social Security Act, certain classes of illegitimates are considered to be dependent whether or not in fact actually supported by their insured parent at time of latter's death. Social Security Act, § 216(h)(2)(A), 42 U.S.C.A. § 416(h)(2)(A).

2. Social Security and Public Welfare ⇐137

Illegitimate child may establish his claim to statutory dependency by showing that he would be entitled to inherit personal property from deceased wage earner under law that would be applied in determining devolution of intestate personal property by courts of wage earner's state of domicile at death. Social Security Act, § 216(h)(2)(A), 42 U.S.C.A. § 416(h)(2)(A).

3. Social Security and Public Welfare ⇐137

Illegitimate child fell within class of illegitimate children statutorily presumed to be dependent because entitled under state law to inherit from insured decedent in event of latter's intestacy, and entitlement to benefits was not affected by circumstance that she would in fact inherit nothing because her individual claim to inherit was primed by surviving spouse and that she would in fact receive nothing by intestacy even if her deceased father had in fact owned any property. Social Security Act, §§ 202(d)(1), (d)(1)(C)(ii), (d)(3), 205(g), 216(h)(2)(A), (h)(3)(C)(ii), 42 U.S.C.A. §§ 402(d)(1), (d)(1)(C)(ii), (d)(3), 405(g), 416(h)(2)(A), (h)(3)(C)(ii); LSA-C.C. art. 919.

J. Michael Fernandez, Jr., Lafayette, La., for plaintiff-appellant.

Leven H. Harris, Dorsite H. Perkins, Jr., Asst. U.S. Attys., Shreveport, La., for defendant-appellee.

Appeal from the United States District Court for the Western District of Louisiana.